

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY

NATIONAL COLLEGIATE ATHLETIC  
ASSOCIATION, an unincorporated  
association, NATIONAL BASKETBALL  
ASSOCIATION, a joint venture,  
NATIONAL FOOTBALL LEAGUE, an  
unincorporated association,  
NATIONAL HOCKEY LEAGUE, an  
unincorporated association, and  
OFFICE OF THE COMMISSIONER OF  
BASEBALL, an unincorporated  
association doing business as  
Major League Baseball,

CIVIL ACTION NUMBER:  
  
3:12-cv-4947-MAS-LHG  
3:14-cv-6450-MAS-LHG

Plaintiffs,

-vs-

CHRISTOPHER J. CHRISTIE, Governor  
of the State of New Jersey, DAVID  
L. REBUCK, Director of the New  
Jersey Division of Gaming  
Enforcement and Assistant  
Attorney General of the State of  
New Jersey, and FRANK ZANZUCCI,  
Executive Director of the New  
Jersey Racing Commission, NEW  
JERSEY THOROUGHBRED HORSEMEN'S  
ASSOCIATION, INC., and NEW JERSEY  
SPORTS AND EXPOSITION AUTHORITY,

Defendants.

and

STEPHEN M. SWEENEY, President of  
the New Jersey Senate, and  
VINCENT PRIETO, Speaker of the  
New Jersey General Assembly,  
SHEILA Y. OLIVER, Speaker of the  
New Jersey General Assembly, and  
NEW JERSEY THOROUGHBRED  
HORSEMEN'S ASSOCIATION, INC.,

Defendant-Intervenors.

Clarkson S. Fisher United States Courthouse  
402 East State Street  
Trenton, New Jersey 08608  
November 20, 2014

**B E F O R E:** HONORABLE MICHAEL A. SHIPP  
UNITED STATES DISTRICT JUDGE

**A P P E A R A N C E S:**

SKADDEN, ARPS, SLATE, MEAGHER & FLOM, ESQUIRES

BY: JEFFREY A. MISHKIN, ESQUIRE  
and

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and

MATTHEW D. MCGILL, ESQUIRE  
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OFFICE OF THE ATTORNEY GENERAL

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and

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THOMAS R. VALEN, ESQUIRE

and

PETER J. TORCICOLLO, ESQUIRE  
Attorneys for the Defendant.

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**A P P E A R A N C E S,   cont'd.**

PETER J. PHIPPS, ESQUIRE  
United States Department of Justice, Civil  
Division.

UNITED STATES ATTORNEY'S OFFICE  
BY: J. ANDREW RUYMANN, ASSISTANT UNITED STATES ATTORNEY  
Attorneys for the Defendant-Intervenors.

Certified as True and Correct as required by Title 28, U.S.C.,  
Section 753

/S/ Cathy J. Ford, CCR, CRR, RPR

1 THE DEPUTY COURT CLERK: All rise.

2 (Open court begins at 9:59 a.m.)

3 THE COURT: Please be seated. Good morning.

4 AUDIENCE: Good morning.

5 THE COURT: We are here today in the matter of the  
6 NCAA versus Chris Christie, et al. Docket Number 12-4947 and  
7 14-6450.

8 May I have appearances of counsel, please.

9 MR. MISHKIN: Yes, your Honor. Good morning.  
10 Jeffrey Mishkin and Anthony Dreyer, Skadden, Arps, Slate,  
11 Meagher and Flom for the plaintiffs.

12 MR. O'SHAUGHNESSY: William O'Shaughnessy, McCarter  
13 and English for the plaintiffs.

14 MR. PHIPPS: Peter Phipps, your Honor, on behalf of  
15 the United States submitted a statement of interest.

16 MR. RUYMANN: Your Honor, also on behalf of the  
17 United States, J. Andrew Ruymann, Assistant United States  
18 Attorney for U.S. Attorney's Office for the District of New  
19 Jersey.

20 THE COURT: Good morning.

21 MR. OLSON: Good morning, your Honor. Theodore  
22 Olson, your Honor, on behalf of the state defendants. Good  
23 morning.

24 MR. MCGILL: Matthew McGill on behalf of the state  
25 defendants.

1 MR. HOFFMAN: John Hoffman, your Honor, on behalf of  
2 the state defendants.

3 MR. JACOBSON: Jeffrey Jacobson on behalf of the  
4 state defendants, your Honor.

5 MR. RICCIO: Good morning, your Honor. Ronald Riccio  
6 on behalf of New Jersey Thoroughbred Horsemen's Association  
7 along with Mr. Elliott Berman.

8 MR. GRIFFINGER: Good morning, your Honor. Michael  
9 Griffinger on behalf of the Senate President and the Speaker  
10 of the Assembly.

11 MR. VALEN: Good morning, your Honor. Thomas Valen  
12 on behalf of the New Jersey Sports and Exposition Authority.

13 MR. TORCICOLLO: Good morning, your Honor. Peter  
14 Torcicollo also on behalf of the Sports and Exposition  
15 Authority.

16 THE COURT: Good morning to you too.

17 Okay. Well, folks, we are here today for oral  
18 argument in what I'll be referring to as *Christie II*.  
19 Everyone is thoroughly familiar with the underlying background  
20 and the procedural history of this case as well as the Court's  
21 and the Third Circuit's decision in what I'm referring to as  
22 *Christie I*. We're not here today to rehash and reargue the  
23 issues of *Christie I*, as they've already been decided by this  
24 Court and by the Third Circuit.

25 So today, I'll hear oral argument only on whether New

1 Jersey's 2014 Law violates PASPA and whether pursuant to the  
2 2014 Law any defendant is in violation of PASPA.

3 As provided in the Court's text order, the Court is  
4 consolidating the Leagues' application for a preliminary  
5 injunction with a decision on the merits through a *sua sponte*  
6 summary judgment decision. Today's oral argument will proceed  
7 like any argument on motion for summary judgment. The  
8 argument will not be heard on the Leagues' preliminary  
9 injunction application. The Court has the discretion to  
10 consolidate the preliminary injunction with the decision on  
11 the merits through summary judgment and that discretion is  
12 appropriate in this case where there is only purely a legal  
13 issue before the Court and no facts or discovery is needed to  
14 decide any of the issues here.

15 The Court has reviewed the parties' extensive  
16 briefing here. And with regard to these issues, the  
17 defendants have made some duplicative arguments in their  
18 different briefs, so I'm going to ask that counsel refrain  
19 from rehashing or rearguing points that may be made by  
20 co-counsel here today. But, certainly, everyone will have an  
21 opportunity to be heard.

22 As this matter originally came to the Court upon  
23 plaintiffs' application, I'm going to first hear from counsel  
24 for the plaintiffs. I'll then from all of the defendants in  
25 opposition. And then plaintiffs get the last word in their

1 reply.

2 So with that being said, I'm going to invite Mr.  
3 Mishkin or Mr. Dreyer, whoever wants to speak for the Leagues.

4 MR. MISHKIN: Thank you very much, your Honor.  
5 Jeffrey Mishkin for the plaintiffs, and may it please the  
6 Court. As your Honor just said, the issue before you is  
7 whether New Jersey Public Law 2015, Chapter 62, 2014 Sports  
8 Wagering Law violates PASPA and is therefore preempted by the  
9 Supremacy Clause of the United States Constitution. We think,  
10 as you know, that statute clearly violates PASPA on its face,  
11 and that plaintiffs are entitled to judgment as a matter of  
12 law.

13 Let me start with a little background. I know you  
14 have the background but I think the context here is important  
15 and I'll be brief. For the past several years, the State of  
16 New Jersey has been trying to achieve precisely what PASPA  
17 prohibits and, that is, the authorization, promotion by the  
18 State of sports gambling at state-licensed casinos and  
19 racetracks. The State has tried a variety of ways to  
20 accomplish that goal. In 2012, of course we all know, they  
21 enacted a law that directly and expressly authorized sports  
22 gambling at casinos and racetracks. This Court and the Third  
23 Circuit found that enactment to be a violation of PASPA and  
24 that PASPA was constitutional and did not constitute  
25 commandeering because PASPA did not require the State to take

1 any affirmative action at all. And despite not being required  
2 to take any action at all to comply with PASPA, the State of  
3 New Jersey decided that it very much wanted to take action.  
4 And three days after the United States Supreme Court denied  
5 certiorari in *Christie I*, the legislature enacted Senate Bill  
6 2250, that bill was styled, "a repeal of prohibitions on  
7 sports gambling" but the repeal applied only at state-licensed  
8 gambling venues, namely, casinos and racetracks.

9 Governor Christie vetoed that legislation on the  
10 ground that a so-called repeal of prohibitions that had the  
11 purpose and the effect of enabling sports gambling to take  
12 place only at state-licensed casinos and racetracks was an  
13 obvious circumvention of PASPA. And the Governor said he  
14 could not lend his name to such a clear violation of federal  
15 law.

16 Now the Governor apparently had a change of heart.  
17 Because about four weeks after that veto, on September 8,  
18 2014, he had the Acting State Attorney General issue a  
19 directive to law enforcement agencies telling them that New  
20 Jersey criminal laws prohibiting gambling should no longer be  
21 enforced with respect to sports gambling but only at casinos  
22 and racetracks. That directive was based on what, to us, was  
23 the astonishing ground that the operative language of the 2012  
24 law that had expressly authorized sports gambling was not  
25 really an authorization at all but was only a repeal of



1 prohibitions that could be severed somehow from the rest of  
2 the statute that had been found unconstitutional. And this  
3 so-called repeal of prohibitions now permitted gambling to  
4 take place, sports gambling at casinos and racetracks.

5           In light of that dubious proposition, the State filed  
6 a motion asking your Honor to clarify or modify your  
7 injunction so that it could now be read to permit precisely  
8 what it had prohibited, state-endorsed gambling at casinos and  
9 racetracks. We were almost finished with the briefing on that  
10 motion. The Leagues and the Department of Justice had  
11 submitted their opposition papers and the State had even asked  
12 your Honor to extend, I think for a second time, their time to  
13 reply. But instead of filing that reply, the State suddenly  
14 withdrew their motion, and said, Never mind about that  
15 directive, the legislature has now enacted another statute  
16 virtually identical to the one that the Governor had vetoed.  
17 And, once again, it purported to enable sports gambling at  
18 casinos and racetracks that of course is the 2014 Sports  
19 Gambling Law that is now before you.

20           According to the defendants, your Honor, the 2014 Law  
21 is once again a repeal of prohibitions that deregulates sports  
22 gambling, that's their contention. But in reality, it is  
23 nothing of the kind. There is no repeal of any prohibitions.  
24 All the State's prohibitions on gambling remain in effect.  
25 The State has simply enacted an exception to those

1 prohibitions in order to accomplish their long held goal of  
2 authorizing and promoting sports gambling at casinos and  
3 racetracks in order to help the state's economy. And the 2014  
4 Law does regulate, expressly regulates sports gambling in a  
5 number of ways: sports gambling is not permitted anywhere  
6 except at state-licensed gambling venues; no one under 21 may  
7 bet on sports; betting is not permitted on college games  
8 played in New Jersey; betting is not permitted on college  
9 teams from New Jersey wherever they are playing their games.  
10 And of real critical importance, your Honor, the 2014 Law  
11 leaves in place the fundamental requirement that casinos and  
12 racetracks must be licensed by the State to even open their  
13 doors to sports gambling. And it leaves in place all the  
14 regulations that casinos and racetracks must comply with in  
15 order to maintain those licenses.

16 Now, defendants say we have changed our position on  
17 whether or not states can repeal their prohibitions on sports  
18 gambling. We have not changed our position at all. States  
19 are free, as we have said, and the Third Circuit, and your  
20 Honor has held, they're free to repeal prohibitions and effect  
21 a complete deregulation of sports gambling if that is really  
22 what they want to do. But what they cannot do is what they  
23 have done here. And that is maintain all of their  
24 prohibitions on sports gambling and create a special exemption  
25 that applies only to certain types of sports gambling and only

1 at state-licensed gambling venues. By leaving in place their  
2 prohibitions, but exempting gambling venues, the State has, in  
3 our view, clearly authorized and promoted sports gambling at  
4 those venues and has conferred the very label of legitimacy  
5 that PASPA prohibits.

6 For that reason, your Honor --

7 THE COURT: Mr. Mishkin, so if I understand your  
8 argument correctly from your papers, it's truly an "all or  
9 nothing" that you're suggesting when it comes to the repeal?  
10 You either repeal everything or nothing?

11 MR. MISHKIN: Well, certainly, if you repeal  
12 everything, your Honor -- and you really are indifferent to  
13 sports gambling, that's fine, under PASPA. If you do  
14 something less than that, you know, we're going to have to  
15 look at it and see whether or not it amounts to an  
16 authorization, a sponsorship, a prohibition, in reality. I  
17 mean, I think that the idea that simply calling something a  
18 repeal of prohibition or a partial repeal of prohibitions, is  
19 not going to be some sort of silver bullet that means you're  
20 not violating PASPA. PASPA is constitutional. And so we are  
21 past the commandeering argument because the State doesn't have  
22 to do anything to comply with PASPA. So we are past  
23 commandeering. So now the question is, What are they doing?  
24 And does it amount to an authorization or a sponsorship? Does  
25 it violate PASPA? I think that's going to be the question in

1 every case.

2 THE COURT: In your view, what did the Third Circuit  
3 mean in *Christie I* when they talked about the State defining  
4 the contours?

5 MR. MISHKIN: Of the prohibitions.

6 THE COURT: Of the prohibitions.

7 MR. MISHKIN: Sure. If you'd rather have it a Class  
8 A felony than a Class B felony? You'd rather have it a  
9 misdemeanor than a felony? You'd rather have civil penalties.  
10 But it's the contours of the prohibition, your Honor, that's  
11 what they're talking about. States do have -- they have room.  
12 There are a number of things they can do and that's why it's  
13 not commandeering. But there is not a hint in the Third  
14 Circuit's decision that you can leave all your prohibitions in  
15 place, create a special exemption for your gambling venues and  
16 call that a partial repeal of prohibitions and you somehow  
17 manage to escape exactly what PASPA is trying to prevent.  
18 That's our argument, your Honor.

19 Let me turn now quickly to the State Constitution and  
20 why it is relevant here. This is not an issue that you need  
21 to reach. It does add, we believe, further support and weight  
22 to the conclusion that the 2014 Law is a violation of PASPA.

23 Under the State Constitution, all gambling in the  
24 state is expressly prohibited, unless it is authorized by law  
25 and regulated. So unless the 2014 Law is construed as an

1 affirmative authorization of sports gambling, it would violate  
2 the State Constitution. And the State Law, we think, should  
3 of course be interpreted in a manner that is consistent with  
4 its own State Constitution.

5 THE COURT: Why should this Court even reach that  
6 issue? Isn't that a question that's better addressed by the  
7 New Jersey Supreme Court or the state court?

8 MR. MISHKIN: Well, I think it's clear, I think  
9 they've already told you what the law is there. I think that  
10 gambling can only be permitted in the state if it's authorized  
11 and regulated --

12 THE COURT: But if you're asking a federal court to  
13 construe a state law against state actors who are state  
14 representatives --

15 MR. MISHKIN: Yes, I realize you cannot enjoin them.  
16 You can reach the question, and I think you do have the  
17 discretion and the supplemental jurisdiction to do that,  
18 again, it is not necessary at all that you reach it here  
19 because if you find that the 2014 Law is a violation to PASPA  
20 on its face, you don't have to sort of take the added, the  
21 added point that it would violate the State Constitution if it  
22 was construed other than as a violation of PASPA because it  
23 must be an authorization by law. But I understand the  
24 sensitivity, your Honor. And the good news is you do not have  
25 to reach it in order to find that the 2014 Law is a violation

1 of PASPA.

2           The last point I'd like to make on the merits  
3 concerns proposed sports gambling at Monmouth Park. Once  
4 again, you do not need to reach this issue to find that the  
5 2014 Law violates PASPA. But whether or not the 2014 Law  
6 violates PASPA, under no circumstances can sports gambling  
7 take place at Monmouth Park because Monmouth Park is owned by  
8 an instrumentality of the State of New Jersey, namely, the New  
9 Jersey Sports and Exposition Authority.

10           Under PASPA --

11           THE COURT: When you say it's owned, is it owned  
12 outright or isn't just simply a landlord/tenant relationship?

13           MR. MISHKIN: Well, no, the facility is owned by the  
14 State, by an instrumentality of the State. They have a  
15 compact, I would call it, but they have a compact, or  
16 contract, or lease with the Horsemen's Association. But the  
17 State, through its instrumentality, owns the facility. And,  
18 again, under PASPA, a government entity, such as the Sports  
19 and Exposition Authority, is forbidden itself to sponsor,  
20 operate, advertise, promote sports gambling and is also  
21 forbidden to license or authorize others to conduct such  
22 gambling. And in this written lease, which is hardly a  
23 passive relationship, the written lease between the Sports and  
24 Exposition Authority and the Thoroughbred Horsemen's  
25 Authority, there is an expressed authorization to conduct

1 sports gambling at a state-owned facility. In addition to  
2 that, your Honor, there is a formula but the rent owed to the  
3 State would go up if revenue was produced from sports gambling  
4 and it's very clear those provisions violate PASPA.

5 Now --

6 THE COURT: Does the Sports and Exposition Authority  
7 have any control or can they exert any control over the park?

8 MR. MISHKIN: Of course. Of course, they own the  
9 property. What they say now is that the 2014 Law somehow is  
10 abrogated that control. That, they say, the 2014 Law has  
11 overwritten those provisions now abrogates them and that the  
12 Sports and Exposition Authority is now left without the  
13 ability either to authorize or forbid the gambling that would  
14 be going on there. But the 2014 Law says nothing about  
15 abrogating state contracts. And the contention that the State  
16 of New Jersey by enacting the 2014 Law has somehow prevented  
17 itself from deciding what may lawfully occur on its property  
18 seems to us sort of a silly proposition. The State of New  
19 Jersey owns the property. And as the owner, it absolutely has  
20 the right to authorize what is done on that property. And  
21 what they have done is to authorize sports gambling in  
22 violation of PASPA.

23 And, your Honor, even if, even if you could read the  
24 2014 Law to somehow compel the Sports and Exposition Authority  
25 to tolerate, you must tolerate sports gambling at a

1 state-owned property like Monmouth Park. That would only  
2 demonstrate that the 2014 Law was itself an authorization or  
3 promotion of state-sponsored gambling and a violation of  
4 PASPA.

5           For all those reasons, your Honor, the plaintiffs  
6 believe that we are entitled to a preliminary injunction  
7 enjoining the implementation and enforcement of the 2014 Law  
8 and in all events enjoining sports gambling at Monmouth Park.  
9 All of the elements for permanent injunction are met here  
10 exactly as they were met in *Christie I* because the 2014 Law  
11 and the operation of sports gambling at Monmouth Park violates  
12 PASPA, injunctive relief preventing that violation follows as  
13 a matter of course. Indeed, as the Department of Justice has  
14 pointed out in their filing, injunctive relief is the only  
15 remedy contemplated and authorized by PASPA.

16           So there is no need here to analyze the specific  
17 factors that in other circumstances would be necessary for the  
18 issuance of a permanent injunction. But again, it doesn't  
19 matter here at all because all those factors we believe are  
20 met - and I'll tip them off very quickly. There is  
21 irreparable harm not only because of the constitutional  
22 violation in enacting a state law that violates the Supremacy  
23 Clause but also because of the factual evidence this Court and  
24 the Third Circuit have already found demonstrates reputational  
25 injury to the Leagues and damage to the Leagues' relationship



1 with their fans. And, of course, the State of New Jersey  
2 itself acknowledges the harm that's caused by sports gambling  
3 by its own expressed prohibitions of betting on the games of  
4 New Jersey colleges and on the collegiate games being played  
5 here in New Jersey. So there is irreparable injury.

6 Monetary damages would not be adequate because, as  
7 your Honor found in *Christie I*, the Eleventh Amendment  
8 precludes such relief against the State. The balance of  
9 hardships clearly favors the plaintiffs. The only hardship  
10 here would be to comply with the obligation to not violate  
11 federal law, that is not a hardship at all.

12 And, finally, your Honor, as to the public interest,  
13 it is obviously in the public interest to ensure that federal  
14 laws are not violated.

15 And for all those reasons, your Honor, we believe  
16 that a permanent injunction should issue. Thank you very  
17 much.

18 THE COURT: Thank you.

19 MR. PHIPPS: May it please the Court, my name is  
20 Peter Phipps from the Civil Division of the United States  
21 Department of Justice. I represent the United States in this  
22 matter. We're not formally a party to the second matter,  
23 *Christie II*, but we filed a statement of interest primarily  
24 related to the construction of PASPA vis-à-vis the current  
25 State of New Jersey Law.

1           On that issue, I appear primarily in front of the  
2 Court to answer any questions the Court may have with respect  
3 to our statement of interest. But, in the meantime, I'm  
4 happy, if necessary, to highlight any of the points made, but  
5 I kind of remain at the Court's discretion as to whether any  
6 of those highlights are needed or not.

7           THE COURT: I think we're fine.

8           MR. PHIPPS: Thank you.

9           THE COURT: Good morning.

10          MR. OLSON: Thank you, your Honor. Theodore Olson on  
11 behalf of the state defendants.

12          The Leagues previously sought and received from this  
13 Court a declaration that New Jersey 2012 Sports Wagering Law  
14 was invalid under PASPA. They repeatedly stated in briefs and  
15 oral argument as did the United States, as did the Third  
16 Circuit, that PASPA was constitutional because it only  
17 prohibited affirmative acts by a state to authorize or license  
18 sports betting. And that New Jersey had no obligation under  
19 PASPA to enact or maintain - those are the words in the  
20 briefs - laws prohibiting sports gambling.

21          In the argument before this Court on February 14th,  
22 2013, as long as they are not affirmatively authorizing, they  
23 are not violating PASPA. In successfully urging the Supreme  
24 Court not to take the Tenth Amendment issue, the United States  
25 Government stated categorically, on Page 11 in its brief in

1 opposition to the cert. petition, that New Jersey was free  
2 under PASPA to repeal its prohibitions on sports wagering in  
3 whole or in part. New Jersey has now fully complied with the  
4 Leagues' demands, PASPA's requirements, and this Court's and  
5 the Third Circuit's decisions. It has repealed the 2012  
6 Sports Wagering Law as well as certain prohibitions and  
7 regulations of sports wagering. It is not licensing or  
8 affirmatively authorizing sports wagering anywhere at any time  
9 in any place in New Jersey. In short, New Jersey is in full  
10 compliance with PASPA as the Leagues, the United States, and  
11 the Third Circuit construe it.

12 But now the Leagues have switched positions. They  
13 now say that the State must repeal everything to do with any  
14 place where unauthorized, unlicensed activity might take  
15 place. The argument is rather strange because there is  
16 probably no place in New Jersey that doesn't have some license  
17 from the State of New Jersey to do something. We made a list  
18 but it's too long to repeat here, but it would include auto  
19 body shops, lawyers, bakeries, barber shops, acupuncture  
20 places, scrap yards, hospitals and so forth. Your Honor would  
21 know this. So the argument that if the institution or the  
22 geographical location where sports betting, which is not  
23 authorized by the State, not licensed by the State, not  
24 permitted by the State, there is no imprimatur from the State,  
25 no seal, no piece of paper with a license, no permit, nothing,

1 it would violate PASPA. This is a switch in tactics by the  
2 State and the Federal Government because if they made those  
3 arguments to you, and if they made those arguments to the  
4 Third Circuit, and if they made those arguments or were  
5 allowed those arguments to be made in their opposition to  
6 petition for certiorari, I submit that there would be a  
7 different result here, a different result in the Third  
8 Circuit. And if there wasn't, there would be a decision by  
9 the United States Supreme Court addressing the commandeering  
10 Tenth Amendment point.

11           The Leagues admit that PASPA permits repeal. Their  
12 only objection is that some specific restrictions that the  
13 other one, other than the part that it might take place where  
14 there is a state license of some sort, is that some specific  
15 restrictions, background limitations, police power enactments  
16 that are not related to sports betting at all, remain still in  
17 place. PASPA cannot possibly mean that. It would be plainly  
18 unconstitutional if it did.

19           The position of the Leagues is such now that New  
20 Jersey is allegedly in violation of PASPA because it did what  
21 the Leagues, the United States, and the Third Circuit said it  
22 could do. It could eliminate in part its prohibitions, in  
23 whole or in part.

24           Your question before was the Third Circuit language  
25 was that there -- the State could control the contours of its

1 prohibitions. That is exactly what the State is doing.

2 THE COURT: Did the Third Circuit hold that, though,  
3 Mr. Olson? Did the Third Circuit give the State an  
4 all-or-nothing proposition when it came down to this  
5 regulation, either you can regulate it or it's deregulated?

6 MR. OLSON: No. I submit that the context of what  
7 the State -- what the Third Circuit said, goes into this  
8 category. If I may answer it this way. On Page 225 of the  
9 opinion it says, PASPA only reaches gambling pursuant to law  
10 or compact. It said over and over again that what PASPA  
11 reaches is affirmative acts by the State to permit and provide  
12 an imprimatur of the State of sports betting.

13 The Court recited, as you did, the history of PASPA,  
14 the concern that the government, the Federal Government, and  
15 we felt it was unconstitutional but the concern articulated by  
16 you and by the Third Circuit was that if states are in the  
17 business of authorizing and licensing, that that will  
18 encourage more sports betting. You asked those questions at  
19 the oral argument when we were here that day. And the  
20 conversation is all about whether or not it was a bad thing  
21 for states to be in this business. But the states didn't have  
22 to lift a finger. The Third Circuit said, and the Leagues  
23 said, the states do not have to lift a finger. And the Third  
24 Circuit said, We do not read PASPA to prohibit New Jersey from  
25 repealing its ban on sports wagering. That's what it has

1 done. Nothing in PASPA requires that the states keep any law  
2 in place. That's at Page 232.

3 The effort, on Page 234, the effort PASPA requires is  
4 simply that the states enforce the laws they choose to  
5 maintain. The Third Circuit, using those words, talking about  
6 the laws that the State of New Jersey might choose to maintain  
7 obviously means they may choose to maintain some laws and they  
8 may choose not to maintain some other laws.

9 THE COURT: But then, what could the dissent have  
10 possibly meant, right? When we look at Judge Vanaskie who  
11 dissented from that very issue because he believed that the  
12 all-or-nothing approach is too coercive. What is he, in  
13 essence, suggesting, that the plaintiffs' reading is an  
14 accurate reading?

15 MR. OLSON: I think he was concerned with that kind  
16 of reading because of the implications of that under the Tenth  
17 Amendment. The language of the Court by the Third Circuit  
18 allows this argument to be made, but I think in context that's  
19 not remotely possible what it could mean. So the idea that  
20 you would have to remove limitations on 10 year olds from  
21 engaging in gambling, or you would have to remove laws that  
22 would prohibit an armed robbery at a place where gambling was  
23 taking place, or that you would have to somehow repeal laws  
24 with respect to the aging workers in any business, or that you  
25 would have to repeal laws having to do with taxation. As you

1 know, the Federal Government taxes illegal profits as well as  
2 legal profits. The idea that you would have to remove all of  
3 that would clearly implicate the Tenth Amendment. And I  
4 submit that all of this language -- and I will quote one more  
5 part, it's on Page 236. PASPA makes clear that the federal  
6 policy with respect to sports gambling is that such activity  
7 should not occur under the auspices of the state license. The  
8 State has made it absolutely clear in its legislation, it's  
9 repealing these prohibitions, and it's stating that nothing in  
10 the laws provide any imprimatur or approval or licensing or  
11 permitting by the State of New Jersey with respect to this  
12 activity. So if PASPA -- the irony would be that the argument  
13 is that although you have lifted the prohibition, you have  
14 decriminalized the activity in certain places, PASPA somehow  
15 requires to be in compliance with PASPA that you must allow it  
16 by not criminalizing it everywhere. You must allow people to  
17 bet on more games, younger people to bet on games, other laws  
18 with respect to the behavior of people in the State of New  
19 Jersey must go out the window. Can Congress possibly have  
20 meant that? Can PASPA possibly mean, when the government,  
21 which is responsible for enforcing this law, said that you  
22 could repeal your laws in whole or in part, they had read the  
23 provision, and that's the position that they're taking. It  
24 seems inconceivable. And I would love to rewrite that cert.  
25 petition and ask the government to file an opposition that

1 withdraws those words and says that, indeed, PASPA requires a  
2 highly reticulated sense of regulation in its state that can't  
3 have its normal police power, its zoning rules, its  
4 environmental rules, its child labor laws, all of the other  
5 provisions of state law must go out the window because of  
6 PASPA. The Tenth Amendment would not permit Congress to put  
7 its hands on the state government in every walk of the state's  
8 life or the citizens of the state in that kind of way. And  
9 that's why I submit, that's exactly why when we started this  
10 case we felt that what Congress had done in PASPA was regulate  
11 the regulatory function of the legislature and the enforcement  
12 activity of the executive in a fashion that was too intrusive.  
13 Congress could prohibit the activity, but it couldn't make New  
14 Jersey prohibit the activity. In order to avoid that very  
15 compelling Tenth Amendment commandeering argument, our  
16 opponent said, no, no, no. It doesn't require New Jersey to  
17 do anything. New Jersey can repeal their laws. They cannot  
18 enforce their laws. We talked about speed limits. I made an  
19 argument in this court that said, If the federal law said that  
20 you can't regulate or license speeding, would that mean that  
21 laws putting speed limits would have to go out the window? I  
22 mean, how far can the Federal Government go with respect to  
23 something like that?

24 And --

25 THE COURT: And the corresponding question is, Are



1 the federal laws so easily evaded that we can cast a law in  
2 such a way to, in essence, get around and do indirectly that  
3 which you cannot do directly?

4 MR. OLSON: Well, I think that's a very good question  
5 because there are limits on what the Federal Government can  
6 do. And that is what the Tenth Amendment does.

7 The Federal Government -- if the Federal Government  
8 wants to prohibit sports betting, it can pass a statute  
9 tomorrow. We concede, maybe not our colleagues, but we  
10 concede that there is interstate commercing law in that  
11 activity or at least much of it. So the Federal Government  
12 can do that. It can prohibit any kind of evasion at all, if  
13 it wants to take responsibility for the statute and  
14 enforcement of the statute. What it can't do is tell a state,  
15 You have got to prohibit sports betting. And, so, because our  
16 opponents understood that argument and it read the cases, they  
17 said, Well, the federal law doesn't do that. It simply  
18 prohibits licensing. So if that's true, New Jersey hasn't  
19 licensed anything. And if that's true, what they said that  
20 New Jersey -- when they said that New Jersey could eliminate  
21 its prohibitions, it could repeal its prohibition, in whole or  
22 in part, that's not an evasion of PASPA. That's lifting a  
23 prohibition.

24 As I said before, the sensible thing would be to  
25 allow New Jersey to regulate the activity and license it and

1 control who can do it or not, get it out of the black market.  
2 The government comes along and says, no, no, no. That might  
3 be a bad policy. And the Third Circuit says this too, that  
4 might be a bad policy. But that's up to the people of New  
5 Jersey. PASPA doesn't interdict that policy choice.

6 THE COURT: If you're correct and this blueprint is  
7 effective, would all states throughout the country be entitled  
8 to, in essence, repeal its criminal laws or repeal, in  
9 essence, any enforcement of the gambling laws on sports  
10 wagering?

11 MR. OLSON: There is no reason why Connecticut or  
12 Mississippi couldn't do the same thing. According to what the  
13 Third Circuit said, according to what the government says  
14 PASPA does, it only reaches so far. Now, I agree, it's bad  
15 policy. It's a good policy to allow the states to regulate  
16 activity and not be required by the Federal Government to  
17 prohibit something that the Federal Government could have  
18 prohibited, if it had wanted to take the blame and take the  
19 responsibility and take the expense of enforcing it. The  
20 government didn't want to do this. This is a peculiar  
21 statute. I said before, I still believe it, that PASPA  
22 reaches inside the legislators and tells it what laws it must  
23 pass. And that's beyond the Congress power that inhibits --  
24 the Congress power is limited by the Tenth Amendment. There  
25 isn't any question about that. That is not what the

1 government and the Leagues said in defense of PASPA. And that  
2 argument was persuasive to two out of the three judges on the  
3 Third Circuit. Because the Court says, PASPA makes clear that  
4 the federal policy with respect to sports gambling is that  
5 such activity should not occur under an affirmative license by  
6 the state. So if PASPA only prohibits affirmative licensing,  
7 you go to the licensing bureau and get a permit to have sports  
8 wagering, that's what PASPA is prohibiting. That's all that  
9 PASPA is prohibiting. That's what the Third Circuit said over  
10 and over again.

11 I started to count the number of times that the Third  
12 Circuit in Pages 230 to 236 approximately said, "only  
13 affirmative actions to license." "Only affirmative actions to  
14 license" are prohibited by PASPA.

15 Now, this is not the way that the whole industry or  
16 activity should be regulated, but that's the government's  
17 position, and that's the Leagues' position, and that's the  
18 Third's position as to the limits what PASPA does. The  
19 government can do -- the government can fix this with a stroke  
20 of a pen tomorrow. The Leagues, with their power in Congress,  
21 can go in and say, The law we passed doesn't go far enough  
22 because it doesn't prohibit the activity that we now say,  
23 although I think they're changing their minds, we now say that  
24 they then said, We don't want all this stuff to take place  
25 until they realized how much money is in fantasy sports and

1 all of those things, but assuming they have the same position  
2 that betting on their games, that \$493 billion industry is a  
3 bad thing, with the stroke of a pen, Congress can fix that by  
4 passing a statute that's permitted by the Tenth Amendment.

5 THE COURT: Is the analysis that this Court is  
6 concerned with today one of revisiting commandeering or is it  
7 really a question of preemption? This 2014 Law as it relates  
8 to PASPA, are we really looking at an issue of preemption  
9 here?

10 MR. OLSON: Well, it's difficult because of the way  
11 that PASPA has been explained by the Third Circuit based upon  
12 the Leagues' and the government's arguments. If it's  
13 preemption, I mean, I think it is commandeering if it were to  
14 be construed the way the Leagues are arguing it's to be  
15 construed now, or the way the government's to be construed now  
16 because it says that somehow the states have to go in and  
17 change other laws with respect to its licensing and it must  
18 pass other laws with respect to the age of people doing  
19 things. Although general police powers are subject to this  
20 law about sports gambling that seems to me to be commandeering  
21 and that seems to me to be unconstitutional under the Tenth  
22 Amendment.

23 Preemption is a situation where the government is  
24 occupying the field in some way. It can deregularize all of  
25 these things and say, We're not going to have any laws about

1 sports betting, it could do that, then it would be preemption.  
2 But if it's preemption in the context of what we're talking  
3 about here today, the 2014 repeal of the 2012 law, what is it  
4 that is being preempted? What are you going to enjoin? I  
5 made a list of things that I thought you might possibly say in  
6 your injunction that they're asking for. Are you going to say  
7 that the 2014 Law that repealed the 2012 Law is preempted,  
8 that law must go away that will reinstate the other laws? Are  
9 you going to say that the lifting of the prohibition is  
10 preempted by PASPA? The 2014 Law is self-executing. It  
11 doesn't require state officials to do anything. Nothing. So  
12 what would the Court enjoin? "Do something," on "do  
13 something" to pass other laws? It's a very difficult  
14 situation that you are being put into.

15           It seems to me, under PASPA, as construed pursuant to  
16 the arguments of the State and the Leagues and the decision of  
17 the Third Circuit because after being told -- in a way it's a  
18 bait-and-switch thing and it puts the Court in a very awkward  
19 position. You're being told that they can repeal all or a  
20 portion of their laws, they can enforce the laws they want to.  
21 After being told all of that, you and the Third Circuit are  
22 now being told well, no, no, they can't repeal all or part of  
23 them. They must repeal all of them. But which ones are we  
24 talking about? The one about 21 year olds? The one about  
25 betting on New Jersey games? The one about allowing sports

1 betting to take place in a barber shop where there is a state  
2 license? What laws are they now saying are preemptive? It's  
3 an impossible situation. But they're in this situation  
4 because of the way the Third Circuit construed the statute.  
5 That's the law. And we accept that. But we accept it under  
6 its terms which says that the thing that PASPA prohibits is an  
7 affirmative piece of paper or a seal or some signature on a  
8 line that says, You may do this here. The State Constitution  
9 is not authorizing anything. And the State Constitution  
10 issues an Eleventh Amendment that's foreclosed for this State  
11 under supplemental jurisdiction or anything else, so I'm not  
12 going to spend any time on that. What is prohibited is an  
13 affirmative act by state officials that says, I am giving you  
14 the blessing to engage in this activity and the State is not  
15 doing that. The State is doing what the Third Circuit said it  
16 could do and, therefore, is not violating PASPA.

17 THE COURT: Okay.

18 MR. OLSON: Thank you, your Honor.

19 THE COURT: Thank you very much.

20 MR. GRIFFINGER: Good morning, your Honor. Michael  
21 Griffinger on behalf of the Senate President and the Speaker  
22 of the Assembly. And I will try not to be repetitive.

23 What the Leagues are asking you to do is to find that  
24 the Repealer Act violates PASPA, plain and simple.

25 In order to do that, you have to look obviously to

1 the precedents. The precedent was set in the Third Circuit.  
2 And in order for you to determine that the Repealer Act  
3 violates PASPA, you have to ignore the statement of the  
4 majority in the Third Circuit that says, All that is  
5 prohibited is the issuance of gambling licenses, not done  
6 here, or the affirmative authorization by law of gambling  
7 schemes, not done here. You would have to ignore the  
8 statement of the Third Circuit that says they, Do not see how  
9 having no law in place governing sports wagering is the same  
10 as authorizing it by law. There is an inequation there. The  
11 two are not comparable. You would have to ignore that in  
12 order to find summary judgment and permanent injunction.

13           You would also have to ignore a statement of the  
14 Third Circuit, "The lack of an affirmative prohibition of an  
15 activity does not mean it is affirmatively authorized by law."  
16 That's what we're talking about here. The prohibition is an  
17 authorization, a licensing or an authorization. And the Third  
18 Circuit has spoken as to what is an affirmative authorization  
19 and what is not.

20           And finally, the Third Circuit said that the sports  
21 gambling violates PASPA, "Only to the extent that it is  
22 conducted pursuant to state law." There is no state law that  
23 pursuant to which sports gambling is being conducted. So  
24 those statements by the Third Circuit were pretty clear as to  
25 what does and does not violate PASPA.

1           The Department of Justice, Mr. Olson told you the  
2 quote from them in their initial papers, that New Jersey is  
3 free to repeal those prohibitions in whole or in part. And  
4 you asked a few questions about that. I mean, what an anomaly  
5 it would be if this were an all-or-nothing situation. And  
6 that is something that the Leagues are seeking here, that  
7 there must be absolutely no regulation whatsoever of sports  
8 betting or otherwise you violate PASPA.

9           Well, you asked about the language of the exact  
10 contours of the prohibition that was in the Third Circuit  
11 opinion. Mr. Mishkin says, Well, that means whether it's a  
12 second degree or a first degree or a third degree or  
13 misdemeanor or something along those lines. What that means,  
14 plain language to me is, what does the prohibition contours  
15 extend to? Does it extend to all premises? Does it extend to  
16 people over 21 or under 21? Does it extend to sports teams of  
17 the State of New Jersey? Those are the contours of the  
18 prohibition that have been contained properly pursuant to what  
19 the Third Circuit permits in the Repealer Law.

20           What else would you have to ignore if you are going  
21 to grant the relief that the Leagues seek? You would have to  
22 ignore the explicit legislative intent set forth in Section 2  
23 of the Repealer Act. This is not just a legislative statement  
24 that accompanies the Act. This is part of the statute which  
25 makes it pellucidly clear that it is not intended "As causing



1 the State to sponsor, operate, advertise, promote, license or  
2 authorize by law" sports betting. What could be more explicit  
3 as the legislative intent. It's not what an individual  
4 legislator says. It's what the statute says what is the  
5 legislative intent. We are not authorizing sports betting.  
6 We are repealing certain portions of the law.

7 If you choose to accept their construction, the  
8 Leagues' construction of the intent of my client, which they  
9 manufacture out of whole cloth, then you would have to ignore  
10 Section 2 as I just quoted.

11 If you accept the plaintiffs' strained effort to  
12 persuade you that a *de facto* or indirect violation exists when  
13 there is no state involvement or authorization, then you would  
14 have to do the same thing straining at the Leagues' request.

15 Mr. Mishkin wants a permanent injunction. You talked  
16 about that in your TRO, some of the elements, four elements  
17 that we are all familiar with in your TRO opinion. One of the  
18 things that you said in there is that there must be a showing  
19 of -- or that there is a showing of irreparable harm. And I  
20 believe what you said was, quote, Plaintiffs' association with  
21 gambling is stigmatizing, end quote. So there are really two  
22 prongs on which you found that there was irreparable harm,  
23 that there was a violation of PASPA and that, in and of  
24 itself, was an irreparable harm. No further showing is  
25 necessary. And I just told you why I don't think we buy this

1 statute that the Repealer Act violates PASPA under the Third  
2 Circuit's guidance.

3           The other was stigmatizing. Stigmatizing, it's bad  
4 for the football industry, and the hockey industry, and the  
5 baseball, and basketball industry, and the college sports to  
6 have sports betting or the spread of sports betting as replete  
7 in their papers.

8           An interesting hierarchy of stigmatization comes to  
9 mind. Is the sports betting in Las Vegas legally and  
10 elsewhere in this country, illegally, really stigmatizing  
11 sports? How about domestic abuse? How about cover-ups? How  
12 about concussions? How about drug abuse? All of the other  
13 things that go on in sports today. Are they not stigmatizing?  
14 The self-righteous statements that sports betting is going to  
15 be terrible for their teams and for the country is belied not  
16 just by the other stigmata that I just mentioned, but by their  
17 very own conduct. Their very own conduct in having an NFL  
18 game in London this year and three more next year where  
19 betting is wide open. You can bet minute to minute as I  
20 understand it. The deals that are being made between the  
21 Leagues and, what is it, something Face Duel or Fact Duel, one  
22 of these fantasy leagues, I don't know what they're doing with  
23 the fantasy leagues, what their economic interest is but when  
24 somebody says, Well, we're here about the principle of  
25 preventing the spread of sports betting and it's really not

1 about the money, the usual case is, it is about the money.  
2 They're making deals. They're making deals, I'm sure, with  
3 ESPN, all these other sports fantasy leagues to get a piece of  
4 the action. They want it too. They recognize sports betting.  
5 Commissioner Silver recognizes it. Mark Cuban recognizes that  
6 sports betting is a thing that is not going to go away and,  
7 therefore, they want to have their involvement with it.  
8 That's hypocrisy, a word I don't hesitate to use.

9 If sports gambling can be condoned by the plaintiffs  
10 in those instances where it gives rise to yet another revenue  
11 stream for them, then apparently the stigma and the injury  
12 claim that plaintiffs say is an irreparable harm just does not  
13 exist.

14 Finally, what else must you ignore in order to find  
15 for the plaintiffs. You must ignore something that is quite  
16 important and certainly is the fourth element of any permanent  
17 injunction, and that's the public interest.

18 To find for the plaintiffs, you must ignore the will  
19 of the people of the State of New Jersey as expressed in the  
20 public hearings held in 2010, the referendum that was  
21 overwhelming passed in 2011, the amendment to the New Jersey  
22 Constitution to remit sports betting, the intent of the  
23 legislature in the 2012 legislation to permit sports betting  
24 and, finally, the 2014 Repealer Act at issue here today which  
25 was passed by the legislature and signed into law by the

1 Governor. That is the public interest that will be defeated  
2 by the injunction that is suggested by the plaintiffs. Only  
3 by turning a blind eye to all of these factors that I've just  
4 enumerated that have to be ignored in order to find for the  
5 plaintiffs, can you grant them summary judgment.

6           However, if you choose to follow the direction of the  
7 Third Circuit majority and if you choose to follow the initial  
8 views of the Department of Justice, which I'll comment on in a  
9 minute, as to what New Jersey could do and if the Court  
10 chooses to follow the clearly expressed legislative intent of  
11 my clients and to note that plaintiffs' claims of irreparable  
12 harm are belied by their own conduct and, most importantly, if  
13 the Court recognizes the public interest as expressed in the  
14 statements I just made, then summary judgment for plaintiffs  
15 must be denied.

16           Now, you asked a couple of questions, you asked,  
17 Well, what happens if New Jersey gets sports betting, if it's  
18 permitted, will other states be free to follow? Mr. Olson  
19 answered that in large measure. But, of course, it comes to  
20 mind, marijuana. If marijuana has been permitted in one  
21 state, will other states follow? Answer, yes. That's a  
22 policy issue state by state. There are states, I'm sure, that  
23 may find it anathema to have sports betting. That's something  
24 for their legislators to consider.

25           In answer to your question about preemption, what

1 comes to mind, in my mind, is that the repealer legislation is  
2 at issue today eliminates regulation. It eliminates  
3 regulation as is set forth clearly in the act by a number of  
4 agencies. You see the certifications that were filed in  
5 support.

6           Eliminating regulation is not preemption.  
7 Instituting regulation in a field that Congress has preempted  
8 by itself regulating, that's preemption. So this is the  
9 reverse of what preemption is here.

10           I'll just comment on one other thing, and that is the  
11 piece we got last night from the United States with their  
12 statement of interest. And there's a very pregnant phrase in  
13 their statement of interest that I think is the lynchpin of  
14 what this is all about. They say at Page 12 and 13, "The  
15 United States' interest arises if the 2014 Act is interpreted  
16 as an authorization by law." I think we've answered that  
17 question. First of all, the repealer is not an authorization  
18 by law. It is a repealer of regulations and statutes,  
19 therefore, it is not saying you may have sports betting. You  
20 may license sports betting. This is not an authorization.  
21 And the other reason is that the legislative intent, as I  
22 pointed out earlier, makes it clear that this is an expressed  
23 statement to the contrary that this is not an authorization.  
24 So that's a very pregnant "if" in the statement of interest.  
25 And I think the two reasons I've given you respond to that

1 particular point.

2 That's basically my argument on this, unless your  
3 Honor has any questions.

4 THE COURT: Thank you so much.

5 MR. VALEN: Good morning. Thomas Valen also Gibbons  
6 PC on behalf of the Sports and Exposition Authority.

7 Your Honor, the Leagues in their reply papers, and  
8 Mr. Mishkin this morning, made a number of points specific to  
9 the Sports and Exposition Authority that I'd like to address  
10 briefly and hopefully not in a way that's duplicative.

11 First of all, the Leagues make a number of sweeping  
12 statements that the fact my client, the Authority, owns  
13 Monmouth Park and leases it to Mr. Riccio's client, the  
14 Horsemen's Association that would cause any sports betting at  
15 Monmouth Park to violate PASPA. It simple doesn't. PASPA on  
16 its face is triggered by a number of verbs. I can repeat them  
17 here: "sponsor, operate," et cetera. "To own," "to lease" are  
18 not among those verbs.

19 They also claim, in a rather sweeping way, that PASPA  
20 is violated by the fact that the Authority might possibly in  
21 the future derive greater revenue through increased rents from  
22 sports wagering if it takes place at Monmouth Park.

23 Now, whether or not the Authority might in the future  
24 gain such increased revenue is purely speculation at this  
25 point, but in any event, like with ownership, it's immaterial

1 because "to profit from" is not one of the things that PASPA  
2 prevents.

3           Next, the Leagues argue that through the lease, the  
4 Sports and Exposition Authority has authorized sports wagering  
5 by compact, which I don't dispute is the same as contract for  
6 these purposes. But I think the context here is critical.  
7 And the timeline, in particular.

8           The 2012 Sports Wagering Act, the one that  
9 implemented a regulated system of sports wagering was signed  
10 on January 17, 2012. The lease at issue which is attached to  
11 the Ralph Marra certification submitted with our brief was  
12 signed on February 29th, 2012, about a month thereafter. The  
13 Repealer Act at issue today wasn't signed until October 17 of  
14 2014. And throughout this entire period there has been no  
15 sports wagering at Monmouth Park. So, as we explained in our  
16 brief, the Repealer Act, the 2014 Act, not only repealed the  
17 2012 Law, but it also took away the authority of state  
18 agencies which we had believed in 2012 we had to authorize  
19 sports wagering whether by compact or otherwise. So any  
20 sports wagering that might in the future take place at  
21 Monmouth Park won't be personal to any authority that was set  
22 forth in the lease.

23           THE COURT: Didn't Judge Chesler already deal with  
24 this issue in the *Pena* case?

25           MR. VALEN: I believe he did. I think he ruled that

1 while Monmouth Park is a state agency, it's not necessarily a  
2 state actor for the purposes of the operations that take place  
3 there. And certainly as the Marra certification makes clear,  
4 if there is anything unclear that's created by the language in  
5 the lease, we'll certainly look to amend it. We don't want  
6 any confusion here or any belief that there is state  
7 authorization or state imprimatur when there in fact is not.  
8 I think that should be the end of it. But, nevertheless, the  
9 Leagues go on to make some arguments based on specific  
10 language in the lease. And as I said, it's important to  
11 remember what the legal regime was in place at the time the  
12 words in the lease were created. But I think it's also very  
13 important to look at the specific language in the provisions  
14 that they cite because there is critical words relevant to the  
15 interpretation that I submit they have provided. Sections  
16 7.01 and 7.02 are cited as purportedly authorizing sports  
17 wagering by the tenant. But Section 7, as a whole, expressly  
18 applies if and only to the extent that, "Then applicable state  
19 and federal law provide for the authorization of certain forms  
20 of gambling including sports gambling." And as the Leagues  
21 have, of course, emphasized for years now, and certainly this  
22 morning, federal law and particularly PASPA doesn't provide  
23 for such authorization. So Section 7 is both ineffective and  
24 immaterial.

25 Similarly, they cite Section 3306. But again, there



1 is critical words that they slide past. The section says,  
2 "Tenants' use and operation of the premises - and here are the  
3 critical words - for racing events shall be deemed sponsored  
4 by the Authority." Racing events is defined on Page 13 of the  
5 lease as horse racing cards or horse racing events. So, like  
6 Section 7, Section 3306 has absolutely nothing to do with  
7 sports wagering.

8 Those are the points I'd like to emphasize, Judge.  
9 If you have any other questions, I'd be happy to address them.

10 THE COURT: I think we're good. Thank you.

11 MR. VALEN: Thank you.

12 MR. RICCIO: Good morning, your Honor.

13 THE COURT: Good morning.

14 MR. RICCIO: Ronald J. Riccio appearing on behalf of  
15 the New Jersey Thoroughbred Horsemen's Association. I'd like  
16 to open my comments on some procedural issues.

17 First is, as your Honor probably suspects --

18 THE COURT: You think I got it wrong.

19 MR. RICCIO: I want to incorporate what we said in  
20 our November 17th letter with respect to the 56F *sua sponte*  
21 motion just so the record is clear on that.

22 With respect to the propriety of granting a summary  
23 judgment to the Leagues on the basis of the record that is  
24 before the Court, as your Honor said at the outset, we're  
25 going to treat this as a motion for summary judgment, so I'm

1 going to argue against it because I think summary judgment is  
2 the wrong procedure to be followed in this case. And the  
3 reason I say that, your Honor, is primarily because as we  
4 stated in our submission, we think that there is a need for  
5 discovery here. And I know your Honor framed the question as  
6 being a purely legal question. And it is a legal question  
7 with respect to whether or not the 2014 Law violates PASPA,  
8 that may be a legal question, but that's not all that's at  
9 play at this juncture in the case.

10           The *Monsanto* case decided by the Supreme Court in  
11 2010 makes it clear, contrary to what counsel for the Leagues  
12 argue, that a permanent injunction must satisfy a four-factor  
13 test. The standard to be applied now with respect to whether  
14 or not a permanent injunction should issue is the same as it  
15 was as to whether or not a preliminary injunction should be  
16 issued. There is the requirement that the Leagues prove to  
17 your Honor, as a matter of law, that the 2014 Law violates  
18 PASPA but they must also show that they are suffering  
19 irreparable injury. They must also show that the hardships  
20 predominate in favor of the Leagues and not in favor of any of  
21 the defendants. And they must also be in a position to show  
22 that the public interest supports the issuance of an  
23 injunction as opposed to a denial of an injunction.

24           So I'm going to talk a little bit, Judge, about the  
25 standards that govern this particular application and what the

1 Leagues have and have not shown at this point in time. This  
2 is not, as we originally had thought, a trial on the merits.  
3 This is a summary judgment procedure, as your Honor clarified  
4 yesterday.

5           With respect to discovery, we only learned a few days  
6 ago - and I put it in my certification to the Court and I  
7 attached a bunch of exhibits - but we just found out to quote  
8 a writer on this topic, there appears to be a type of gold  
9 rush between the fancy giants in securing partnerships with  
10 major professional sports leagues and the teams situated  
11 therein. What's the gold rush for? Well, the gold rush seems  
12 to be from the literature we're reading, although, we haven't  
13 had any discovery, the gold rush seems to be that the Leagues,  
14 and/or specific teams in the Leagues, and/or specific players  
15 in the Leagues, are looking to get a piece of the action,  
16 whether as a sponsor, whether as an operator, or in some cases  
17 taking an equity position in FanDuel, DraftKings and the many  
18 other fantasy games platforms that are out there. And these  
19 fantasy games, your Honor, are fantasy in name only. They are  
20 wagers that get placed based on the performance of individual  
21 players in the Leagues' games. That's not fantasy. Fantasy  
22 in name only. And the Leagues are sponsoring it; endorsing  
23 it; they have their own platforms for it; their players are  
24 participating in it. And we need to know whether or not this  
25 is going on to the same extent that it appears to be going on

1 and why is that relevant?

2 Well, it seems to me, your Honor, it's relevant on  
3 irreparable injury, it's relevant on the public interest, and  
4 it's relevant on unclean hands. So for that reason, we think  
5 that the procedure of a summary judgment is premature at this  
6 point in time.

7 Additionally, Judge, the recent flurry of statement  
8 of material facts that came in last night -- I've never had to  
9 respond to a summary judgment motion where the statement of  
10 material facts came in less than 12 hours before the oral  
11 argument so obviously there's a problem with that, but in  
12 reading through it, what became obvious to me is that what the  
13 State submitted, and what the Sports Authority and the  
14 legislature submitted, is disputed by and large by the  
15 Leagues. So to suggest that the record is clean for Appellate  
16 purposes, to suggest that there are no genuine issues of  
17 material facts, you would have to ignore the flurry of  
18 submissions that came in within the last 24 hours.

19 Now, with respect, your Honor, to the standard to be  
20 applied to the questioning of whether or not the Leagues are  
21 entitled to a permanent injunction, I would refer your Honor  
22 to the *Monsanto* case. I cited it in my November 17th letter.  
23 And I'll just read from it briefly because it captures the  
24 point. "A plaintiff seeking permanent injunction must satisfy  
25 a four-factor test before a court may grant such relief. A

1 plaintiff must demonstrate (1) that it has suffered an  
2 irreparable injury; (2) that remedies available at law, such  
3 as monetary damages, are inadequate to compensate for that  
4 injury; (3) that, considering the balance of hardships between  
5 the plaintiff and defendant a remedy in equity is warranted;  
6 and, (4) that the public interest would not be deserved by a  
7 permanent injunction.

8           Now, that's their burden on the merits. In the  
9 context of summary judgment, as your Honor knows, the  
10 standards are very familiar. All doubts get resolved in favor  
11 of the nonmovant, all reasonable inferences are resolved in  
12 favor of the nonmovant. So there is a lot of procedural  
13 hurdles here that the Leagues have not come close to getting  
14 past in order to show their entitlement to the extraordinary  
15 remedy of a permanent injunction.

16           I want to now direct my comments to the balancing of  
17 hardships. The Leagues' counsel said, there is no hardship  
18 here to any of the defendants. And it caused me to bristle  
19 because it demonstrated a complete disregard for the people  
20 whose livelihoods are at stake at Monmouth Park Racetrack, the  
21 teller, the clerks, the security guards, the maintenance  
22 workers, the trades people. Tell them there is no hardship if  
23 their place of employment has to close because there is an  
24 injunction because the one thing that the operators of the  
25 facility, the operators of the business believe is needed to

1 save that place, tell them there is no hardship by losing  
2 their job, especially in an economy like this, people that  
3 have worked there for many, many years being told to go out,  
4 people who are old being told to go out, no job. So there is  
5 a hardship. And it's not just a hardship to people, there is  
6 a hardship to the business of Monmouth Park.

7 I mean the suggestion is that we're a tagalong in  
8 this case, you know, that the Horsemen are just sort of  
9 somehow or other involved in this case. But there are real  
10 people who are in this case because they have a significant  
11 stake in the outcome. The business of Monmouth Park is at a  
12 standstill now. It's at a standstill because the revenue that  
13 we thought we would be able to generate from sports betting  
14 isn't coming in. Projects that were on the drawing board are  
15 now on hold. The Horsemen themselves, the 3,000 members of  
16 the New Jersey Thoroughbred Horsemen's Association, people who  
17 have a liberty right to do whatever the law of New Jersey  
18 allows them to do, they're being told you can't do what the  
19 New Jersey law allows you to do. That's a liberty interest.  
20 That's a hardship when a liberty interest is cut off, that's a  
21 hardship. The Equine Industry in New Jersey, it's a domino  
22 effect, your Honor. If Monmouth Park closes, the New Jersey  
23 Equine Industry is as good as dead and the open areas -- the  
24 open space that is protected by the Equine Industry, that's  
25 going to go down the tubes. So for the Leagues to say that

1 there is no hardship is just -- it's missing the obvious  
2 points of the hardship that my client and the public will  
3 suffer as a result of this injunction.

4 Now, what's the hardship to the Leagues? What's the  
5 hardship to the Leagues? If no injunction is granted, what's  
6 going to happen? One location in Oceanport, New Jersey, known  
7 as Monmouth Park Racetrack is going to be open to do  
8 something. And what is this terrible thing that Monmouth Park  
9 is going to do? They're going to take wagers on the Leagues'  
10 games. What a terrible thing to happen to the Leagues.  
11 Meanwhile, in Nevada, there's over 180 locations where that  
12 same activity is going on. It goes on in Delaware. The  
13 Leagues take their games to England so it can go on there.  
14 The fantasy games are now, we know, supported completely by  
15 the Leagues. So the bottom line is that the only hardship to  
16 the Leagues as a result of the injunction being denied is that  
17 there's going to be another competitor in their fantasy game  
18 business and that competitor is going to be Monmouth Park.  
19 But, your Honor, that's not a hardship in the injunction  
20 sense. What that is, it's unfair competition. And that's  
21 illegal. That goes to unclean hands which is relevant to  
22 whether or not these plaintiffs have a right to a permanent  
23 injunction.

24 Now, with respect to the substantive issues that have  
25 been addressed by my co-counsel, my colleagues, I try not to

1 repeat what they say, but some of it does bear reemphasis.

2 No one has mentioned the fact that when we were here  
3 in *Christie I*, and the Leagues stood up before your Honor to  
4 defend PASPA, what they said to your Honor was that PASPA is  
5 entitled to a presumption of constitutionality and that you  
6 have to do your best to give it a savings interpretation. And  
7 you did. And the Third Circuit did as well.

8 Well, now it's our turn to make that same argument  
9 because you are required, just as you gave PASPA the  
10 presumption of validity, to give the New Jersey Law the  
11 presumption of validity. Just as you gave PASPA the savings  
12 interpretation, you must give the New Jersey Law a savings  
13 interpretation.

14 One of the ways in which you can give New Jersey the  
15 benefit of a savings interpretation is built right into the  
16 statute, it's Section 4, the severability clause. And under  
17 the severability clause, the New Jersey lawmakers made it  
18 clear that if any phrase, clause, sentence, word or provision  
19 of this act is declared to be unconstitutional, invalid,  
20 preempted or inoperative, in whole or in part, or the  
21 applicability thereof to any person is held invalid by a court  
22 of competent jurisdiction, the reminder of this act shall not  
23 thereby be deemed unconstitutional, invalid, preempted, or  
24 inoperative. Now, what does that mean?

25 Well, the Leagues have said to you that PASPA does



1 not prohibit complete deregulation of sports betting by New  
2 Jersey. That's okay, under PASPA. If that's okay under  
3 PASPA, accepting that premise, then, if you're going to grant  
4 an injunction to the Leagues, you need to sever only those  
5 parts of the New Jersey law that are preempted. What might  
6 they be? The age limitation? The limitation to New Jersey  
7 teams? New Jersey colleges and possibly the locations? So  
8 what your Honor would do if you granted a permanent  
9 injunction, which I think you would have to do under the  
10 severability clause, is preserve the rest of the statute. And  
11 what's the effect of preserving the rest of the statute? In  
12 preserving the rest of the statute, it would mean that all  
13 sports betting in New Jersey is completely deregulated which  
14 of course is what the Leagues say PASPA allows but which one  
15 of the plaintiffs in the case, namely, the MBA doesn't want.  
16 So you got some of the Leagues saying complete deregulation is  
17 okay under PASPA. You got the Commissioner of the MBA saying  
18 it isn't, but the reality is that the only road to a permanent  
19 injunction in this case that the Leagues could follow would be  
20 a severability of those provisions in the 2014 Law that are in  
21 violation of PASPA.

22 Now, the other point I wanted to make, Judge, is that  
23 you said in response to a comment by one of the counsel, that,  
24 Isn't the interpretation of the New Jersey Constitution  
25 something that should be resolved by the state courts?

1 Because you recognize correctly that there's comedy there,  
2 that you have a limited jurisdiction as a federal judge to  
3 interfere with state laws and state constitutions. And  
4 there's another aspect to that and, that is, and we cited this  
5 case in our brief, an opinion by Justice Cardozo, and what he  
6 said was, When it comes to interpreting what a state statute  
7 means, the federal court is bound by what the state lawmakers  
8 say the words in the state statute mean. Even if, I think one  
9 powerful example, even if it turned Humpty Dumpty on its head.  
10 If that's what the state lawmakers say the state law means,  
11 then the federal court is bound to follow it.

12 I would say, your Honor, that under Section 2 of the  
13 2014 Law, the New Jersey lawmakers, out of an abundance of  
14 caution, because they covered it in Section 1, have explained  
15 very clearly what they intended the 2014 Law to mean and how  
16 it is to be construed. And it is not to be construed to be a  
17 state sponsorship, operation, advertising, promoting,  
18 licensing or authorizing by law or compact, et cetera. So for  
19 your Honor to grant the Leagues' permanent injunction, you'd  
20 have to sever the unconstitutional provisions, you'd have to  
21 disregard what the state lawmakers said the 2014 Law means in  
22 Section 2, and you would have to interpret the repeal language  
23 in Section 1 to mean something other than what it means.

24 With respect to the repeal language in Section 1, the  
25 Leagues argue that there is all sorts of gambling laws that

1 are not repealed. I don't know what they're talking about.  
2 If you look at Section 1, your Honor, Title 2C of Chapter 37  
3 is repealed. What is that? Criminal gambling offenses.  
4 Chapter 40 of Title 2A is repealed. What is that? Gaming and  
5 Lottery Civil Penalties Section. Chapter 5, repealed.  
6 Breeding and Racing of Horses. Title 5 Chapter 12, the  
7 entirety of the Casino Control Act. All repealed. And then  
8 to eliminate any doubt at all, there is a catchall clause.  
9 "Or otherwise and any rules and regulations." "Any rules and  
10 regulations that may require or authorize any state agency to  
11 license, authorize, permit or otherwise take action to allow  
12 any person to engage in the placement or acceptance of any  
13 wager on any sports contest." I don't know what's left to  
14 repeal? There can't possibly be anything left. The Leagues  
15 have not identified what was not repealed. And it seems to me  
16 that everything that could possibly have been repealed, has  
17 been repealed.

18 With respect, your Honor, to the Third Circuit's  
19 interpretation of PASPA. I think all of us have read the  
20 opinion multiple times, I'm sure. And I'm not going to repeat  
21 what's been said before about the much contours language other  
22 than to say that it has nothing to do with penalties. Talks  
23 about prohibitions, not penalties. That's a rewrite of the  
24 Third Circuit's opinion by the Leagues. But there is two  
25 phrases in the opinion that I think are worth mentioning. One

1 is on Page 235. This is a key sentence. Because the Third  
2 Circuit tells you what it is holding. It says, But no one  
3 contends that PASPA requires the states to enact any laws and  
4 we have held, that's a word of art as your Honor knows, we  
5 have held that it also does not require states to maintain  
6 existing laws. It doesn't say complete deregulation. And to  
7 clarify it or to read it together -- on Page 234, the Court  
8 says, The effort PASPA requires is simply that the states  
9 enforce the laws they choose to maintain. You would think,  
10 your Honor, if the Third Circuit meant to say that New Jersey  
11 has an either/or choice, either you completely prohibit  
12 everything regarding sports betting or you completely  
13 deregulate it, we would not be here trying to divine what the  
14 Third Circuit meant. They told you what they meant.

15 THE COURT: What is it that you believe the dissent  
16 was all about? What was Vanaskie talking about when he said,  
17 he thought it was too coercive to have an approach that would  
18 result in somewhat of an all or nothing?

19 MR. RICCIO: I think he was focusing on the  
20 alternative *dicta* that the Court used in talking about  
21 complete deregulation. He was focusing on the alternative  
22 *dicta*, the hypothetical. If PASPA does coerce the states, the  
23 Third Circuit said, in the alternative if we were to say it  
24 does coerce the states, which is not what they say in their  
25 holding, in their holding they said, If it did not coerce the

1 states. It gave the states a choice. Maybe this was put in  
2 the majority opinion in anticipation of further review down  
3 the road, I don't know, but it was an alternative. It was a  
4 hypothetical. And the hypothetical was, not that New Jersey  
5 had the choice of complete deregulation or not, but if PASPA  
6 preempted the field by coercing the states, then PASPA could  
7 result -- could cause a complete deregulation, that's where  
8 the words are used. If the holding was complete deregulation,  
9 it would be impossible to jibe the much contours language --  
10 or the contours language, the much room language, the language  
11 that I just read to your Honor. It just doesn't make sense.

12           And one thing for certain is Judge Fuentes knew what  
13 he was writing or knew what he meant. If he meant to say  
14 complete deregulation, wouldn't he have said that, isn't that  
15 the simplest thing in the world to say. And there is a  
16 reason, a further reason why the Third Circuit did not give  
17 New Jersey the "either/or choice." And the further reason is  
18 that's not what the Leagues argued in the Third Circuit and  
19 that's not what the DOJ said in their brief in opposition to  
20 our cert. petition.

21           Mr. Mishkin said that they haven't changed their  
22 position in this case. And he said their position has been  
23 complete deregulation. Well, I have the words that he used in  
24 this court in *Christie I* in describing why he thought PASPA  
25 did not violate the Tenth Amendment. And you're not going to

1 find the words "complete deregulation" in his statement to the  
2 Court. What you will find is him saying, "We've never claimed  
3 that PASPA compelled the State to maintain any prohibition on  
4 sports gambling." I don't know why not. That is a perfectly  
5 plausible state of affairs for a state to be indifferent as to  
6 whether private individuals are gambling on sports. And then  
7 he concluded by saying, There is nothing in PASPA that  
8 requires states to enact, maintain, or enforce any  
9 prohibitions on sports gambling. And for that reason, your  
10 Honor, PASPA does not violate commandeering principles. If  
11 that's the same as saying complete deregulation then, you  
12 know, I don't know what I am reading. When he meant to say  
13 complete deregulation, he said it today. They changed their  
14 position.

15           Mr. Fishman argued in the Third Circuit, "It is up to  
16 the State of New Jersey to determine for itself the extent to  
17 which it will or will not enforce that law." It could not be  
18 clearer. This is not complete deregulation. It's exactly  
19 what the government said in their brief. You could repeal in  
20 whole or in part. It's what the Third Circuit said in its  
21 opinion. You get to choose what sports betting laws you want  
22 to keep and what sports betting laws you don't want to keep.  
23 This business about the either/or choice that is given to New  
24 Jersey is just not borne out in the Third Circuit's opinion.  
25 It's not borne out in counsel's argument. It's not borne out

1 in the briefing. It's an effort to have your cake and eat it  
2 too, I suppose. Because that's the end result of all of it.

3 A few words, your Honor, I don't mean to go on for so  
4 long, but my apologies. The Leagues give the reading of the  
5 2014 Law, a reading that would produce an absurd result. They  
6 say that the 2014 Law is *de facto* authorization and *de facto*  
7 licensing. But if you look at the 2014 Law, and if you read  
8 it in a way that is designed to save its validity that is read  
9 in a way to give content to the way the lawmakers say the law  
10 was intended, *de facto* authorization and *de facto* licensing is  
11 an invention. It's asking you to judicially rewrite as a  
12 federal judge a state law that has been interpreted by state  
13 lawmakers in a way that is the exact opposite of what they  
14 want you to interpret the State Law to mean. Respectfully,  
15 your Honor, I think that that is not within the scope of your  
16 authority as a federal judge for the same reason as you said  
17 you didn't think you could get into the state constitutional  
18 issue. It's the same issue, the same issue. Interpreting the  
19 State Constitution, interpreting the State Law, it's the same  
20 issue with respect to the proper role of a federal judge in a  
21 situation like this.

22 On the issue of the landlord/tenant relationship  
23 between Monmouth Park and the New Jersey Sports and Exposition  
24 Authority. The Authority has noting to do with Monmouth Park.  
25 Their workers aren't there. They don't tell Monmouth Park

1 what to do. They don't get involved in the operations. They  
2 have submitted a declaration from Mr. Marra who tells you  
3 exactly what's going on there. They'll change the lease if  
4 the lease has to be changed. I don't think that it does.  
5 And, in any event, all of the context that may involve any  
6 state authorization of sports gambling are repealed in Section  
7 1 of the 2014 Law. So the lease issue is a nonissue.

8 On the issue of the scope of the injunction, because  
9 we had a question arise toward the tail end, it was an awkward  
10 situation, I was on the phone, you were trying to listen and  
11 it had to be corrected.

12 If your Honor is inclined to grant a permanent  
13 injunction, I hope you're not for the reasons that have been  
14 given here, but two things need to be carved out of the  
15 injunction. One is, the Leagues cannot get an injunction that  
16 enjoins Monmouth Park from taking sports wagers on games as to  
17 which the Leagues are not involved. If Monmouth Park wants to  
18 take sports bets on golf, tennis, or soccer, NASCAR, whatever  
19 it is, that's none of the Leagues' business. They don't  
20 have -- they're not representative plaintiffs in a class  
21 action. They don't have third-party standing. There is no  
22 such thing as virtual representation. They have no basis  
23 whatsoever for enjoining Monmouth Park from doing what the  
24 Third Circuit says is the liberty right of Monmouth Park which  
25 is to do that which is not prohibited by law. So the



1 injunction needs to carve out any games, any sports activity  
2 other than those involving the Leagues.

3           And the second thing, your Honor, that I would  
4 respectfully suggest needs to be carved out is Monmouth Park  
5 should be allowed to do whatever the Leagues are doing with  
6 respect to fantasy games, whatever it is. I'm not sure  
7 exactly what it is, but whatever FanDuel is doing, whatever  
8 DraftKings is doing, whatever the NFL's platform on fantasy  
9 games is doing, Monmouth Park should be able to do. They  
10 can't enjoin or ask your Honor to enjoin Monmouth Park from  
11 doing the very activity that they're engaged in. Because to  
12 do that is, in essence, to use your Honor as an  
13 instrumentality to perpetuate unfair competition on Monmouth  
14 Park. So those two things need to be carved out.

15           And then the final point, Judge, is on the amount of  
16 the bond in the event an injunction is granted. We think  
17 that's an issue that should be held in abeyance when and if  
18 restraints are entered and limited if the restraints are  
19 vacated. As far as the amount of the bond, we think that Mr.  
20 Drazin's certification and your Honor's ruling, I think it was  
21 a million seven for every 14 days, that should just be  
22 continued on a going-forward basis. The reality is that if an  
23 injunction is entered and then vacated, that once sports  
24 betting were to take place at Monmouth Park that would be the  
25 only game in town. They would have 100 percent of the New

1 Jersey market. And the New Jersey market, we believe, based  
2 on demographics is going to be three times what the Nevada  
3 market is. And why is it going to be three times? Because  
4 New Jersey is a bustling metropolis. It's bordered on  
5 Pennsylvania, Connecticut and Delaware. Nevada is in the  
6 desert. They get a lot of visitors but they don't have that  
7 many people living there. So the demographics are, we think,  
8 three times whatever Nevada does on sports betting, that's  
9 what New Jersey will do. And if we're the only game in town  
10 for six months or a year, however long others decide to weigh  
11 in, that will be all Monmouth Park's market. So the estimate  
12 that we gave, we think is reasonable. It may even be on the  
13 low side. But there is no reason for your Honor to reduce the  
14 amount of the bond.

15 Thank you for your patience.

16 THE COURT: Thank you. On reply. Mr. Mishkin.

17 MR. MISHKIN: Thank you, your Honor.

18 By my count you got somewhere between 12 and 15  
19 briefs in front of you on the *Christie II* matter, you asked us  
20 not -- trying to count up *Christie I*, you asked us to stay  
21 away from that, and I'm not sure we have entirely, and I  
22 really just want to make a point or two, sort of a basic point  
23 about PASPA.

24 Mr. Olson said that we argued and successfully that  
25 PASPA was constitutional and not commandeering because it

1 required no affirmative act at all. Precisely right. That's  
2 why it's constitutional. States do not have to do anything,  
3 anything, to comply with PASPA. But the State of New Jersey  
4 wanted to do something. They wanted to take affirmative acts.  
5 And they did in several different ways. And now we got the  
6 2014 Law, that's an affirmative act. And that piece of  
7 legislation, your Honor, whatever they call it, has the  
8 obvious purpose and effect of having state-enabled gambling in  
9 the casinos and the racetracks and only there. It is on  
10 substance impossible to look at what New Jersey has done and  
11 has been trying to do for three years to accomplish exactly  
12 what PASPA says you can't accomplish. Now, the argument here  
13 is, Well, we somehow outsmarted PASPA. We somehow figured out  
14 a way through the maze of what PASPA is clearly trying to  
15 prevent, which is promotion by the State. Can they really say  
16 they're not promoting gambling in their casinos and  
17 racetracks? You've heard over and over again, the economic  
18 problems they're trying to address. How can they not be  
19 promoting sports gambling in their casinos and racetracks?  
20 That's the whole point of this. And when you leave all your  
21 prohibitions in place and you only exempt your existing  
22 gambling venues, there is no way in substance to say that you  
23 have not authorized and promoted sports gambling. Federal  
24 preemption is not a game, your Honor. The cases say, you must  
25 look at substance to see what's happening here. You cannot

1 allow a federal act which is clear on its face, which is valid  
2 and constitutional to be circumvented in the obvious way that  
3 is being circumvented here. The 2014 Law, your Honor, is a  
4 violation of PASPA. And we ask that it be permanently  
5 enjoined. If you do permanently enjoin it, we don't have to  
6 it talk about a bond. Thank you.

7 THE COURT: A few other issues. Mr. Riccio raised a  
8 few questions I wanted you to address.

9 MR. MISHKIN: Sure.

10 THE COURT: This whole severability argument. Let me  
11 hear as to your thoughts on whether or not there's a savings,  
12 there is a presumption of validity, there's some severability  
13 that can occur to save what they're calling the repealer. And  
14 then, also, I'd like to hear from you as to whether or not  
15 it's your position that the relief that you're seeking ought  
16 to also inure to other sports, such as Major League Soccer or  
17 NASCAR or alike?

18 MR. MISHKIN: Right. The basic point of the 2014 Law  
19 is to enable sports gambling in the casinos and racetracks,  
20 the gambling venues that are already heavily regulated. I'm  
21 not sure what severing would -- so it would not be in casinos  
22 and racetracks anymore? That's the point. The only place  
23 it's being permitted is in heavily regulated gambling venues.  
24 Now -- no, because I think you have to do a much closer  
25 analysis of how important to the overall act this -- you can't

1 bet if you're under 21, New Jersey colleges can't be included,  
2 New Jersey venues can't be included. I think you have to take  
3 a much closer look to see whether it would be possible to  
4 sever those is not really being central to it. But what is  
5 central to it is that the prohibitions all stay in place  
6 except at the specially favored gambling venues. That's the  
7 whole point of the bill. I don't see how you can sever it and  
8 avoid the violation of PASPA. It doesn't seem possible to me.

9 Now, on the issue of other sports, I think once any  
10 sport or the government, for that matter, I'm not here with  
11 any sport in particular, convinces you that PASPA is being  
12 violated by a particular act of the State than that act is  
13 invalid and I don't -- and they're enjoined from violating  
14 PASPA through that act, it would apply to any activity that  
15 constitutes sports gambling and therefore would apply to any  
16 sport, I believe. I think your Honor concluded that at the  
17 end of the TRO proceeding.

18 THE COURT: Okay. Thank you.

19 MR. MISHKIN: Thank you very much, your Honor.

20 THE COURT: Well, counsel, I appreciate the oral  
21 argument. Again, it's been robust. It's been diligent and  
22 very much appreciated. Right now, we're going to have a very  
23 long night tonight but I do expect to issue a decision by  
24 close of business tomorrow.

25 Yes, I'd say by close of business tomorrow is a fair

1 estimate as to when we can get it out. If not, it will  
2 certainly end up with a date of November 21st, meaning it  
3 could come out later in the day but you'll have a decision by  
4 tomorrow.

5 I thank you for all of the arguments and your  
6 submissions. That's all we have for today.

7 THE DEPUTY COURT CLERK: All rise.

8 (Court concludes at 11:38 a.m.)  
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